

FCC MAIL SECTION

Federal Communications Commission

DA 99-2653

Mar 22 3 45 PM '99

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 97-203
Table of Allotments,) RM-9132
FM Broadcast Stations.)
(Wallace, Idaho and Lolo, Montana)

REPORT AND ORDER

(Proceeding Terminated)

Adopted: November 24, 1999**Released: November 30, 1999**

By the Chief, Allocations Branch:

1. The Commission has before it a *Notice of Proposed Rulemaking*, 12 FCC Rcd 13,893 (1997) ("Notice"), issued at the request of Hawkeye Properties, Inc. ("Hawkeye"), permittee of Station KQWK(FM), Channel 248C2 (97.5 MHz), Wallace, Idaho. The *Notice* proposed amendment of the FM Table of Allotments by changing its community of license from Wallace to Lolo, Montana as that community's first local aural service. The *Notice* also proposed that Station KQWK's license be modified to specify Lolo as its new community of license and to operate on downgraded Channel 248C3.

2. Hawkeye filed comments in response to the *Notice*, reiterating its intention to apply for Channel 248C3 at Lolo, if allotted, and to construct a station there. Comments opposing Hawkeye's proposal were filed by Sunbrook Communications, Inc. ("Sunbrook"), licensee of FM Stations KGGL(FM) and KZOQ(FM) and of AM Stations KGRZ(AM) and KYLT(AM), all of Missoula, Montana.¹ Hawkeye proposed to downgrade Station KQWK to Channel 248C3 and to reallocate that channel from Wallace to Lolo under the provisions of Section 1.420(i) of the Commission's Rules. That section permits the modification of a station's license to specify a new community of license while not affording other interested parties the opportunity to file competing expressions of interest in the proposed allotment. *See Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989) ("Change of Community of License R&O"), *recon. granted in part*, 5 FCC Rcd 7094 (1990) ("Change of Community of License MO&O").

¹ Sunbrook's comments were filed 3½ months late, and Hawkeye filed a motion to strike it. Sunbrook filed an opposition to the motion, accompanied by its Petition for Leave to Accept Late-Filed Comments. While acceptance of late-filed comments is not contemplated by our Rule §1.415(d) unless specifically requested or authorized by the Commission, which was not done here, we will, however, accept Sunbrook's comments in the interest of promoting the resolution of this case on the basis of an enhanced record.

3. The proposed allotment reference site for Lolo, Montana, a U.S. Census Designated Place, is located 151.7 kilometers (94 miles) away from the transmitter site for Station KQWK at Wallace, Idaho, insufficient to meet the Class C2-C3 co-channel interstation separation requirement, and is, therefore, short-spaced and mutually exclusive with Station KQWK.² As we reported in the *Notice*, Hawkeye stated that Lolo has a population of 2746 and has no local aural transmission service. Hawkeye also cited a number of indicia that purportedly denote Lolo as a community for allotment purposes. In addition, we took note of Hawkeye's report that Wallace would retain local transmission service provided by the fulltime AM Station KWAL and, potentially, by Station KSIL(FM), to operate on Channel 264C, for which a construction permit (File No. BPH-960916MD) has been granted.³

4. As stated in the *Notice*, while neither Wallace nor Lolo is located within an urbanized area, the proposed Lolo station, operating on downgraded Channel 248C3, would provide a 70 dBu city grade signal not only over all of Lolo, but also over the entirety of the Missoula, Montana Urbanized Area. Such coverage, therefore, well exceeds the percentage of urbanized area coverage, 50%, that triggers the need to justify a request for a first local transmission service preference. A petitioner would do so by demonstrating the independence of the proposed city of license from the nearby central city. See *Headland, Alabama, and Chattahoochee, Florida*, 10 FCC Rcd 10,352 (1995) and *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988) ("*Tuck*"). Accordingly, we requested that Hawkeye provide additional information to constitute a *Tuck* showing to demonstrate whether Lolo is sufficiently independent of Missoula to warrant a first local service preference or whether the Missoula stations should be attributed to Lolo.

5. Hawkeye filed comments that included, along with reaffirmation of its intention to apply for Channel 248C3, if allotted, information additional to that offered in its petition to demonstrate that "Lolo is sufficiently independent of the central city of Missoula to justify a first local service preference." That additional information consisted of reports that: 1) Lolo lies at the junction of several major state highways, 2) the telephone directory it shares with nearby Florence, Montana had 26 names that incorporate the name Lolo, and 3) several named residents made unsworn statements that Lolo is separate and distinct from Missoula.⁴

² The proposed Channel 248C3 at Lolo would require a co-channel separation distance of 177 km (110 mi) from the site for KQWK on Channel 248C2 at Wallace. See Rule §73.207(b)(1).

³ We note that another rulemaking proposal is pending regarding KSIL(FM). In MM Docket 98-159, the Commission proposes to reallocate KSIL(FM)'s Channel 264C and change its community of license from Wallace to Bigfork, Montana. A decision in that docket will be released shortly after this decision.

⁴ Hawkeye also reports that the 12-mile stretch of highway from Missoula to Lolo has no retail and little residential development, and that the two communities are not contiguous. In addition, the president of Hawkeye reports on his personal contacts with several residents who "talked of incorporating sometime in the near future," and with the Lolo Middle School secretary who "echoed those sentiments" and noted that Lolo had at least 6 churches of differing denominations.

6. In its opposition, Sunbrook notes that the information Hawkeye provided in response to the *Notice* only repeated the same information it already had provided in its petition for rulemaking. Sunbrook argues that its opposition is otherwise based on Hawkeye's alleged failure to meet certain reallocation criteria and that its proposal does not constitute a preferential arrangement of allotments. Station KWQK would not be providing a first aural reception service in either Lolo or Wallace, alleges Sunbrook, and, therefore, would not satisfy the first allotment priority.⁵ Further, the movement of Station KWQK to Lolo would deprive Wallace and surrounding areas with the potential of receiving their second aural reception service, which would constitute the second allotment priority. Such movement to a community like Lolo, already well-served by existing stations, would not be in the public interest. Sunbrook finally claims that Lolo would not be deserving of a first local transmission service preference, allotment priority three, because it fails the three-part *Tuck* test of signal population coverage, relative size and proximity of the small community to the central city, and interdependence of the suburban community and the central city of the Urbanized Area. Sunbrook claims that 70 dBu coverage of the entirety of Missoula by the Lolo station denotes Lolo's lack of independence from Missoula, that the relative small population of Lolo and its close proximity indicates that Lolo is a "mere appendage" of the Missoula Urbanized Area, and that each of the seven factors denoting interdependence demonstrates Lolo's high degree of dependence on Missoula. Sunbrook provides numerous survey results as to the volume of highway traffic between Lolo and Missoula, indicating that many Lolo residents work elsewhere. Sunbrook points out that Lolo lacks other indicia that would suggest independence. Finally, Sunbrook alleges that compared to Lolo, Wallace is underserved by stations in the Missoula market. Additionally, Sunbrook insists that relocation of the potential Wallace aural service would not provide any service benefit to Lolo that does not already exist.

7. *Discussion.* As noted above and in the *Notice*, without the additional information to perform a *Tuck* analysis, we could not determine whether Hawkeye's proposal warrants a first local service preference. In its comments, Hawkeye provided barely more information than it already had provided in its initial petition. This information falls well short of that required to establish a first local service preference under *Tuck*. Specifically, based on the record in this proceeding, the first two *Tuck* factors, the degree of signal coverage over the adjacent urbanized area and the size and proximity of the suburban community and the central city of the urbanized area, both strongly suggest a dependence of Lolo on Missoula. City-grade coverage of the proposed Lolo station would encompass the entirety of the urbanized area and, according to the 1990 U.S. Census, Missoula is more than 15 times the size of Lolo. On the critical third *Tuck* factor (the interdependence of the suburban community with the central city of the urbanized area), Hawkeye has not shown that a majority of the eight factors regarding independence has been met. Of these eight factors, four appear to favor the dependence of Lolo on the Missoula

⁵ The FM allotment priorities are: (1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) Other public interest matters. [co-equal weight given to priorities (2) and (3).]

Urbanized area (*i.e.*, extent to which residents work in the urbanized area versus Lolo, the lack of media outlets in Lolo, the lack of a local government and elected officials, and the lack of independent police, fire protection, and other municipal services). While parts of three factors may support a finding of independence (*i.e.*, statements from residents that they perceive the community as independent, the presence of 26 businesses with Lolo in their names, and the sharing a local phone book with Florence), this is not sufficient to outweigh the evidence provided by Sunbrook on dependence. We also note that no information was submitted by either side on one of the factors (*i.e.*, whether Missoula and Lolo are in the same advertising market). Under these circumstances, we must attribute the Missoula stations to Lolo and not credit Lolo with a first local service under Priority (3). As a result, the proposed reallocation and downgrade would trigger Priority (4), other public interest matters, and would be considered as a 11th local transmission service.

8. By way of comparison, retaining Station KQWK(FM) at Wallace and having it built there would trigger Priority (2) because it would provide a second full-time reception service to 1035 persons in an area of 1325 square kilometers (511.8 square miles). ⁶Retention of the station at Wallace would also provide new service to underserved persons. Specifically, 2669 persons would receive a third full-time reception service in an area of 2781 square kilometers, and 1182 persons would receive a fourth full-time reception service in an area of 515.9 square kilometers.

Since the existing arrangement of allotments triggers a more important allotment priority than the proposed arrangement of allotments, the public interest is better served by retaining the allotment at Wallace.

9. Accordingly, IT IS ORDERED, That the petition for rulemaking filed by Hawkeye Properties, Inc. IS DENIED.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning the above, contact J. Bertron Withers, Jr., Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

⁶ This figure for second full-time reception service takes into account the two other authorized stations licensed to Lolo: KWAL(AM) and KSIL(FM).